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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19__

No. _____

RAYMOND C. CARTER,
d/b/a/ CARTER ENTERPRISES OF DENVER,
Petitioner,
V.
THE SMALL BUSINESS ADMINISTRATION
AND
MITCHELL KIBELINSKI,
SUBSTITUTE RESPONDENT,
IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR,
OF THE SMALL BUSINESS ADMINISTRATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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Dated August 29, 1983.

QUESTIONS PRESENTED

1. Whether it was error to proceed on Petitioner's claim against the Small Business Administration as a claim for judicial review pursuant to the Administrative Procedures Act, 5 U.S.C. §701, et seq., rather than as a claim for damages for breach of contract and **quantum meruit** relief pursuant to 15 U.S.C. §634(b)(1).

2. Whether it was error to deny Petitioner's request for a jury trial on his claim for breach of contract and **quantum meruit** relief and his affirmative defenses to the counterclaims.

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2. The decision below raises significant and recurring problems concerning the standard of review to be applied in the actual seeking of money damages for breach of contract and **quantum meruit** relief against the Small Business Administration. 11

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IN THE
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RAYMOND C. CARTER,
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v.

THE SMALL BUSINESS ADMINISTRATION
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MITCHELL KIBELINSKI,
SUBSTITUTE RESPONDENT,
IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR
OF THE SMALL BUSINESS ADMINISTRATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

The petitioner, Raymond C. Carter, d/b/a Carter Enterprises of Denver, respectfully prays that a writ of certiorari issue to review the judgements and opinions of the Colorado Court of Appeals entered in this case on December 22, 1977, and December 9, 1982.

OPINION BELOW

The opinion of the Colorado Court of Appeals issued on December 22, 1977, has been published and is cited as *Carter vs. Small Business Administration*, 40 Colo. App. 271, 573 P. 2d 564 (1977) (hereinafter referred to as Carter I). The opinion is attached as Appendix A hereto. The opinion of the Colorado Court of Appeals issued on December 9, 1982, an unpublished opinion, is attached as Appendix B hereto (hereinafter referred to as Carter II).

JURISDICTION

The judgement of the Colorado Court of Appeals issued on December 22, 1977, in Carter I, reversed the decision of the trial court dismissing the complaint and ordered that the cause be remanded for reinstatement of the complaint and for further proceedings. Pursuant to this decision, the matter was adjudicated in the trial court. Petitioner then appealed a second time to the Colorado Court of Appeals which entered a judgement dated December 9, 1982. A timely petition for rehearing was denied on January 6, 1983. A timely petition to the Colorado Supreme Court for a writ of certiorari was denied on May 31, 1983. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Whether it was error to proceed on Petitioner's claim against the Small Business Administration as a claim for judicial review pursuant to the Administrative Procedures Act, 5 U.S.C. §701, et seq., rather than as a claim for damages for breach of contract and **quantum meruit** relief pursuant to 15 U.S.C. §634(b)(1).

2. Whether it was error to deny Petitioner's request for a jury trial on his claim for breach of contract and **quantum meruit** relief and his affirmative defenses to the counterclaims.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 5

§ 701 Applications: definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that-

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law,

United States Code, Title 5

§ 704 Actions reviewable

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

United States Code, Title 15

§ 634 (b) (1) Powers of Administration

In the performance of, and with respect to, the functions, powers, and duties vested in him by this Act, the Administrator may-

(1)sue and be sued in any court of record of a State having general jurisdiction, or in any United States disctrict court, and iurisdisction is conferred upon such district court to determine such controversies without regard to the amount in controversy; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Administrator or his property.

STATEMENT OF THE CASE

The disputed issue in this case arose from Petitioner's participation in and subsequent termination from a program known as the "8(a) Program" (15 USC § 631 et. seq.) administered by the Small Business Administration of the federal government (hereinafter referred to as "SBA"). The purpose of the program is to assist eligible small firms not yet able to compete effectively in the market place toward the goal of self-sufficiency. The "8(a) Program" seeks to achieve this objective by assisting small minority service contractors to obtain government contracts through bid negotiation, thus bypassing competitive bidding. An applicant accepted into the "8(a) Program" is accepted for a three year period, with a longer period of participation available.

Petitioner first became involved with the SBA when he applied for a business start up loan. As a result of that loan,

Petitioner was provided with a business counselor who referred him to the "8(a) Program" and encouraged him to participate in the "8(a) Program". In 1970, he was assisted by an agent of the SBA in obtaining a competitive bid contract to do janitorial cleaning service at the Internal Revenue Service Center in Ogden, Utah. This contract was not initially within the "8(a) Program". Petitioner then obtained a second start up loan from the SBA in order to begin performance on this contract.

In September, 1971, Petitioner was accepted into the "8(a) Program." It was represented to him at that time that the program would last three years and Petitioner relied upon that representation in preparing his business plans and his course of action in dealing with the SBA. An agent of the SBA did negotiate the Ogden, Utah, janitorial service contract for Petitioner as a "8(a) Program" contract for the 1972-1973 fiscal year.

During the two year period that Petitioner held the Ogden, Utah, janitorial service contract, he performed in a competent manner. Despite the fact the Petitioner had made a profit on the "8(a) Program" contract in fiscal year 1972-1973, the SBA refused to renew the contract in fiscal year 1973-1974. In fact, the "8(a) Program" contract for the janitorial services in Ogden, Utah, was given to a different "8(a) Program" contractor who maintained the contract for three years. Not only did the SBA fail to procure the janitorial service contract in Ogden, Utah, for the 1973-1974 fiscal year, but they also failed to assist the Petitioner in finding an alternate "8(a) Program" contract at a bid sufficient to insure a profit to Petitioner, as recommended by the Certified Public Accountant assigned by the SBA to assist the Petitioner.

The SBA terminated Petitioner from the "8(a) Program" after only one year. This action left Petitioner in a position of having made drastic changes in his business operation and having incurred great indebtedness to the SBA based upon representations to him by agents of the SBA regarding the advisability, profitability, and longevity of his participation in "8(a) Program." During the course of petitioner's contracts obtained through the SBA, he did not generate sufficient income to repay the two SBA loans, even though the proceeds of the contracts were assigned to the SBA.

On August 31, 1975, Petitioner filed a complaint in the District Court in and for the City and County of Denver, State of Colorado, in which he sought damages for breach of contract and relief in the nature of **quantum meruit**. The trial court granted the SBA's Motion to Dismiss for Failure to State a Claim based upon its determination that the matter in controversy was a "discretionary matter" and not reviewable judicially, and, thus, the trial court lacked jurisdiction.

Petitioner appealed the dismissal to the Colorado Court of Appeals challenging the trial court's conclusion that it lacked jurisdiction to review petitioner's claim for breach of contract and **quantum meruit** relief. The Colorado Court of Appeals properly determined that the trial court had jurisdiction in this matter by virtue of 15 U.S.C. §634 (b). Consistent with a number of federal court decisions the Colorado Court of Appeals held that, "This section waives sovereign immunity and confers jurisdiction over the SBA and its officials in monetary and declaratory relief actions." (Appendix A, at pg. 20, infra). The appellate court ordered the cause remanded to the trial court for reinstatement of the complaint and further proceedings.

On remand the SBA filed its Answer as well as a Counterclaim against Petitioner for money allegedly due and owing on the two loans which were purportedly in default and unpaid. Petitioner

answered the Counterclaim by acknowledging that he had signed the notes, but asserted affirmative defenses based upon the totality of the dealings between the parties, their contractual agreements as alleged in Petitioner's Complaint, and principles of equity.

Petitioner had previously timely filed and perfected a demand for jury trial as to all issues. Prior to trial, the trial court ruled that Petitioner's request for a jury trial be stricken. The trial court further stated that Petitioner's relief would be limited to the judicial review of whether there existed a rational basis for the action taken by the SBA in its dealings with Petitioner.

The apparent basis for the trial court's decision to treat the case as one involving the question of abuse of administrative discretion rather than the principles of law pertinent to breach of contract or **quantum meruit** relief was the unfortunate dicta of the appellate court in Carter I. In that case, once the court decided that the trial court had jurisdiction under 15 U.S.C. §634(b), the Court offered its opinion that the case was governed by the Federal Administrative Procedure's Act, 5 U.S.C. § 701, et seq., and, as such, the trial court's function was limited to determining whether there was a rational basis for the agency action taken.

The trial court bifurcated the trial, directing Petitioner to present evidence relative to the question of liability. Following a trial to the court, the Court found that Petitioner had not met his burden and entered judgement in favor of the SBA. Petitioner's timely Motion for a New Trial or, Alternative, Alteration or Amendment of Judgement and Objection to Findings of Fact and Conclusions of Law was denied.

The SBA subsequently filed a Motion for Partial Summary Judgment on the Counterclaim against Petitioner. Petitioner

reasserted his right to have his affirmative defenses relating to the contractual agreements between the parties tried to a jury. The court denied the request for a jury and granted the Motion for Summary Judgement on the Counterclaim.

Petitioner then perfected his second appeal to the Colorado Court of Appeals. In that appeal Petitioner argued that it was error for the trial court to proceed as though his claim was one for judicial review of an administrative decision. He argued that the Administrative Procedures Act, 5 U.S.C. §701, et seq., was not applicable since his claim was actually one for breach of contract and **quantum meruit** relief. Petitioner further argued that he was entitled to a jury trial on those issues.

The Colorado Court of Appeal, in an unpublished opinion, affirmed the judgement of the trial court. The Court correctly stated that the trial court had " . . . jurisdiction to decide a claim for money damages for breach of contract, and there is no indication that a standard other than that for any other civil action should apply." (Appendix B, at pg. 23, infra). The court then erroneously reaffirmed the holding in Carter I that a different standard did indeed apply and that the action was properly governed by the Administrative Procedures Act, 5 U.S.C. §701 et. seq., and that the standard to be applied was whether there was a rational basis for the agency action taken. (Appendix B, at pg. 24, infra).

Petitioner then filed a Petition for Writ of Certiorari in the Colorado Supreme Court in which he argued that the Colorado Court of Appeals decision that the Administration Procedures Act's standard of review governed the case was contrary to applicable law and that he was entitled to a jury trial on his claim for breach of contract and the counterclaim asserted by the SBA. The petition was denied. Thus, this petition is directed to the Colorado Court of Appeals since it is the highest state court to render an opinion on the merits.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decisions of the federal courts as to the proper standard of review to be applied to claims for breach of contract and **quantum meruit** relief brought against the Small Business Administration.

Petitioner brought a claim against the SBA seeking damages for breach of contract and **quantum meruit** relief. The jurisdiction basis of the lawsuit was 15 U.S.C. §634 (b)(1), which provides that the Administrator of the SBA may " . . . sue and be sued in any court of record in a State having general jurisdiction." At no time did petitioner seek relief pursuant to the judicial review provisions of the Administrative Procedures Act, 5 U.S.C. §701 et seq. The provisions of that act are simply not applicable to the type of complaint asserted by the petitioner against the SBA.

The Colorado Court of Appeals, in both Carter I and Carter II, held that the Administrative Procedures Act, 5 U.S.C. §701 et seq., was applicable to petitioner's claim and, thus, the standard of review was whether there was a rational basis for the SBA's action t[illegible]en with respect to petitioner. The Court reached this result by focusing exclusively upon 5 U.S.C. §701 (a)(2), which provides that judicial review of agency action is precluded under the Administrative Procedures Act when " . . . agency action is committed to agency discretion by law." The court properly determined that the agency action involved in this case was not agency action of the type that is committed to agency discretion by law. Thus, judicial review would not be precluded under 5 U.S.C. §701 (a)(2).

However, the Colorado Court of Appeals failed in either opinion to consider the impact of 5 U.S.C. §704 upon the question whether review of the agency actions complained of in this

case was limited to review under the Administrative Procedures Act or whether some other standard of review was applicable. That statute provides that judicial review under the Administrative Procedures Act is available when there are no other adequate remedies in a Court by which to review the agency action in question. In other words, if there are other adequate remedies for the agency action complained of, then the remedies provided in the Administrative Procedures Act do not apply.

If the Colorado Court of Appeals had properly applied 5 U.S.C. §704, as urged below by petitioner, it would have concluded that there were other adequate remedies, i.e. remedies for breach of contract and **quantum meruit**. Thus, the standard of review should not have been whether there was an abuse of discretion. By failing to complete the analysis of whether the Administrative Procedures Act was applicable, the Colorado Court of Appeals reached a result that was directly contrary to the weight of federal court decisions.

A number of federal courts have held that the judicial review provisions of the Administrative Procedures Act do not apply where there exists the availability of money damages for a breach of contract claim against the agency in question. See eg., *State of Minnesota vs. Weinberger*, 359 F. Supp. 789 (D.C. Minnesota 1973); *Baker vs. U.S.*, 390 F. Supp 532 (D.C. D.C. 1973); *Alabama Rural Fire Insurance Company vs. Neighbor*, 530 F. 2d. 1221 (5th Cir. 1976); *Ames-Ennis vs. Midlophian Limited*, 469 F. Supp 939 (D.C. Md. 1979).

Futhermore, several federal courts have determined that the SBA is subject to actions seeking money damages for breach of contract and **quantum meruit** relief. In *Mar vs. Kleppe* 520 F. 2d. 867 (10th Circuit 1975), the Plaintiff brought an action against the SBA seeking money damages on alleged breach of an oral agreement and **quantum meruit** relief. He demanded a

jury trial of the issues. The 10th Circuit Court of Appeals determined that under 15 U.S.C. §634 (b), jurisdiction is given to sue the Administrator of the SBA for the money damages sought by the plaintiff. The plaintiff's complaint seeking money damages and request for a jury trial was ordered to be reinstated. *Id.*

Other federal cases have specifically found that claims for money damages may be brought against the SBA under 15 U.S.C. §634 (b)(1). *Romeo vs. United States*, 462 F. 2d. 1036 (5th Circuit 1972), (cert. denied 410 U.S. 928, 93 S. Ct. 1361, 35 L. Ed. 2d 589 (1973); *Pottharst vs. Small Business Administration*, 329 F. Supp 1142 (E.D. La. 1971); *Simpkins vs. Davidson*, 302 F. Supp. 456, (S.D. N.Y. 1969). See also, *NAACP vs. Civiletti*, 609 F. 2d. 514 (D.C. Cir. 1979), wherein the Court notes in footnote 12 that the "sue and be sued" clause of 15 U.S.C. §634 (b)(1) " . . . places the SBA on a par with private parties for purposes of federal court litigation."

The Small Business Act does not state that the actions of the Administrator are subject to review under the Administrative Procedures Act. The cases cited above make it clear that 15 U.S.C. §634 (b)(1) provides an avenue for a legal determination of controversies arising from the acts of the Administrator where the plaintiff is seeking money damages for breach of contract and **quantum meruit** relief. A lawsuit seeking money damages brought under that section provides an adequate remedy for the agency action in question. Thus, judicial review under the Federal Administrative Procedures Act is inappropriate. The Colorado Court of Appeals opinion to the contrary is directly in conflict with the great weight of federal court decisions on the subject.

2. The issue of the standard of review to be applied in actions seeking of money damages or breach of contract and **quantum meruit** relief against the SBA is one of vital importance which this court should determine.

The declared policy of the Federal government and the purpose of the SBA is set forth in 15 U.S.C. §631 (a) as follows:

> "It is the declared policy of the congress that the government should aid, counsel, assist and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to assure that a fair proportion of the total purchases and contracts or sub-contracts for property and services for the Government including but not limited to contracts or subcontracts for maintenance, repair, and construction: the place for small-business enterprises, to ensure that a fair proportion of the total sales of Government property to be made in such enterprises, and to maintain the strength of the economy of the Nation."

In order to carry out that policy and purpose, the SBA is responsible for administering programs involving millions of dollars in contracts and assistance with large numbers of American business people. Agreements, both written and oral, are entered into by the SBA with small businesses on a daily basis.

It is important to the integrity of the business community and our economic system that the SBA be held accountable to the businesses with which it provides contracts and assistance on the same basis as would any other business entity. To allow the SBA to interact with people in a business context on a basis where it is not accountable under well established principles of contract law will have a discouraging and unsettling effect on those business entities that deal with the SBA. The standard of abuse of discretion is too imprecise and unsettled to adequately regulate the conduct of business of between the SBA and the thousands of business entities with which it deals.

The relatively well-established principles of contract law offer a far better means by which to regulate the dealings of the SBA. Congress implicitly recognized the benefit of the application of contract law when it provided that the Administrator of the SBA could be sued. The Administrator may to sue to enforce agreements pursuant to general contract principles. Fairness and equity require that he be subject to suit under the same principles. The standard of abuse of discretion is simply not appropriate.

If the decision of the Colorado Court of Appeals is allowed to stand, the thousands of business entities that deal with the SBA will have the enforcement of their agreement with that agency subject to the discretion of the agency itself. They will not be able to enforce their agreements in the manner intended by Congress when it provided the Administrator may sue and be sued. They will face the unsettling and disruptive prospect of having their agreements with the SBA breached at the discretion of the agency so long as there is no abuse of discretion. Had Congress intended such a far-reaching result, it would have expressly provided that the Administrative Procedures Act was applicable or it would have refused to provide another adequate remedy such as the "sue and be sued" provisions of 15 U.S.C. §634 (b)(1).

Because of the importance of the question raised by this Petition to business dealings between large numbers of small businesses and the SBA involving millions of dollars of contracts, it is critically important that this Court definitively state what standard of review is to be applied to claims against the SBA such as those raised by petitioner. Such a definitive opinion affirming the decisions of the Federal Courts-that the standard is not abuse of discretion-is necessary in order to preserve the integrity of the dealings between individual business entities and the SBA and to carry out the intent of Congress that the SBA be accountable for money damages and breach of contract and **quantum meruit** relief.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgement and opinion of the Colorado Court of Appeals.

Respectively submitted,

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August 26, 1983

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 1983, three copies of the Petition for Writ of Certiorari were mailed postage prepaid, to the Soliciter General, Department of Justice, Washington, D.C. 20530.

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APPENDIX A

December 22, 1977

COLORADO COURT OF APPEALS

No. 76-903

RAYMOND C. CARTER, d/b/a/ CARTER ENTERPRISES OF DENVER,
Plaintiff-Appellant,
v.
THE SMALL BUSINESS ADMINISTRATION, and MITCHELL KIBELINSKI, substitute defendent, in his official capacity as Administrator of the Small Business Administration,
Defendants-Appellees.

Appeal from the District Court of the City and County of Denver
Honorable Mitchel B. Johns, Judge

DIVISION II
Opinion by JUDGE ENOCH
Silverstein, C.J., and Sternberg, J., concur

JUDGEMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS

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Plaintiff, Raymond Carter, appeals from the dismissal of his action against defendants, Small Business Administration (SBA) and Mitchell Kibelinski, administrator. We reverse.

Plaintiff's complaint alleged that in 1970 and 1971, plaintiff, sole proprietor of Carter Enterprises, a Denver janitorial service, procured two SBA loans totalling $49,000. In the time interval between procuring the first and second loans, plaintiff learned, through a counseling assistance program provided by the SBA, of the SBA's section 8(a) program, a program designed to benefit minorities owning or controlling small businesses. See 13 C.F.R. §124.8-1, et seq. He applied for admittance into the program, and his actions thereafter, including the procurement of the second loan, were geared towards being admitted into the program. He claimed the SBA advised him to procure a government contract in Ogden, Utah, for the 1971-72 year, and based on SBA advice, he underbid and was awarded the job. He suffered losses in the performance of the contract. After admitting plaintiff into the section 8(a) program the following year, the SBA procured the Ogden contract and subcontracted it out to plaintiff. However, again plaintiff incurred losses. In 1973-74, the SBA awarded the Ogden contract to a different disadvantaged minority businessman, advising plaintiff to seek government contracts nearer Denver.

Plaintiff claimed an oral agreement existed whereby he was to be admitted into the 8(a) program for a minimum period of three years, but that the SBA refused to approve or submit his proposed bids until he secured independent financing. However, he asserts he was unable to secure such until he had been awarded a contract. Plaintiff contends the SBA breached its contract with him by failing to comply with the statutory and regulatory duties set forth in 15 U.S.C. §637 and 13 C.F.R. ch. 1. Furthermore, plaintiff claimed the SBA was unjustly enriched because it received services worth far more than the compensation paid plaintiff. Plaintiff sought $150,000 damages for breach of contract, and $51,000 for unjust enrichment. The trial court held the matters in controversy to be actions committed to agency discretion by law, and thus unreviewable, and accordingly, it dismissed the action without prejudice.

I.

We first address defendant's contention that the order of dismissal without prejudice is not an appealable final judgement. We do not agree with this contention.

Generally, a judgement dismissing only a complaint without prejudice is not final and appealable, e.g., *Schoenwald v. Schoen*, 132 Color. 142, 286 P. 2d 341, unless specific circumstances exist, i.e., the action cannot be saved by any amendment to the complaint. **See, e.g.**, *Borelli v. City of Reading*, 532 F. 2d 950 (3d. Cir.) (1976); *Conway v. Slaughter*, 440 F. 2d 1278 (9th Cir.) (1971); *Azar v. Conley*, 480 F. 2d 220 (6th Cir.) (1973). It is apparent that this complaint could not have been salvaged by any amendment. Therefore, under the circumstances of this case, the dismissal without prejudice is an appealable final judgement. *Levine v. Empire Savings & Loan Ass'n.*, Colo. ,557 P. 2d 386.

II.

Plaintiff contends that the district court does have jurisdiction and that the issues raised are reviewable. We agree.

The Federal Administrative Procedure Act provides that judicial review is precluded over "agency action (which) is committed to agency discretion by law." *5 U.S.C.* §701 (a)(2). The phrase "agency action . . . committed to agency discretion by law" has become a legal term of art signifying "those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971); *Sabin v. Butz*, 515 F. 2d 1061 (10th Cir.) (1975). Thus, the determination of whether an agency's action is "committed to agency discretion by law," depends upon whether some type of legal standard can be found or implied by which to hold the agency accountable. *Sabin v. Butz, supra; Arizona Power*

Authority v. Morton, 549 F. 2d 1231 (9th Cir.) (1977); *St. Louis University v. Blue Cross Hospital Service*, 537 F. 2d 283 (8th Cir.) (1976), *cert. denied*, U.S. . . S. Ct. . L. Ed. 2d ; *Coomes v. Adkinson*, 414 F. Supp. 975 (D.S.D.) (1976). A legal standard may be implied from statutory language, underlying legislative objectives, and the nature of the action authorized or regulated. *Sabin v. Butz, supra; Arizona Power Authority v. Morton, supra; St. Louis University v. Blue Cross Hospital Service, supra; Coomes v. Adkinson, supra.* In the absence of a legal standard by which to hold the agency accountable, the agency's action is committed by law to its discretion and is not reviewable by the courts.

The question in this case is whether SBA action taken by the administrator under the powers and duties vested in him by 15 U.S.C. §637 are such actions as are committed to agency discretion by law, and thus not reviewable.

The SBA relies upon *People Brewing Co. v. Kleppe*, 360 F. Supp. 729 (E.D. Wis.) (1973), in support of its contention that judicial review over SBA action taken pursuant to §637 is precluded because such action is "committed by law to agency discretion." While the court so stated, a careful reading of the decision discloses that this pronouncement was dictum and unnecessary to the resolution of the case. Futhermore, the court's opinionis devoid of any analysis which would lead one to conclude that principles enunicated in *Citizens to Preserve Overton Park, supra*, were even considered. For these reasons, we feel *Peoples Brewing Co., supra*, is not persuasive authority on this issue.

The purpose of the SBA Act is to assist small businesses "in order to preserve free enterprise." 15 U.S.C. §631; *Ray Baillie Trash Hauling, Inc. v. Kleppe*, 477 F. 2d 696 (5th Cir.) (1973), *cert. denied*, 415 U.S. 914, 94 S. Ct. 1410, 39 L. Ed. 2d 469. Section 637 refers to actions authorized thereunder in terms of "duty." Section 634(b) provides in part:

> In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter, the Administrator may--
>
> (1) sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversy without regard to the amount in controversy; . . . .

This section waives sovereign immunity and confers jurisdiction over the SBA and its officials in monetary and declaratory relief actions. *Mar v. Kleppe*, 520 F. 2d 867 (10th Cir.) (1975); *Romeo v. United States*, 462 F. 2d 1036 (5th Cir.) (1972), *cert. denied*, 410 U.S. 928, 93 S. Ct. 1361, 35L. Ed. 2d 589; *Jet Services, Inc. v. Hoffman*, 420 F. Supp. 1300 (M.D. Fla.) (1976); *Pottharst v. Small Business Administration*, 329 F. Supp. 1142 (E.D. La.) (1971); *Simpkins v. Davidson*, 302 F. Supp. 456 (S.D.N.Y.) (1969). Similar language relative to duties and powers appears also in §637. Since we have a legislative objective expressed, together with a statutory term (duty) which imputes accountability, and a jurisdictional grant phrased in similar language, we find congressional intent creating a legal standard for judicial review of SBA action taken pursuant to §637.

We therefore hold that the actions authorized under §637, while discretionary, are not committed to agency discretion by law and thus they are reviewable. Accordingly, since the court did have jurisdiction to determine whether there was any abuse of discretion in the official's performance of their powers and duties authorized under §637, dismissal of plaintiff's action was error. The scope of judicial review of discretionary agency action is limited, however, as stated in *Sabin v. Butz, supra:*

> The court is not empowered to substitute its judgement for that of the agency. The court's function is exhausted where a rational basis is found for agency action taken.

We do not, by this holding, imply any evaluation of the merits of this case, nor do we imply that §634 (b)(1) necessarily subjects every SBA discretionary action to review by the courts. *See e.g., Dubrow v. Small Business Administration*, 345 F. Supp. 4 (C.D. Cal.) (1972).

The judgement is reversed and the cause is remanded for reinstatement of the complaint and for further proceedings.

CHIEF JUDGE SILVERSTEIN and JUDGE STERNBERG concur.

APPENDIX B

December 9, 1982

COLORADO COURT OF APPEALS

No. 79CA1176

RAYMOND C. CARTER, d/b/a
CARTER ENTERPRISES OF DENVER,

Plaintiff-Appellant,

v.

THE SMALL BUSINESS ADMINISTRATION
and MITCHELL KIBELINSKI, substitute
defendent, in his official capacity
as Administrator of the Small
Business Administration

Defendants-Appellees.

Appeal from the District Court of the
City and County of Denver
Honorable James C. Flanigan, Judge

DIVISION II — JUDGEMENT AFFIRMED

Opinion by JUDGE STERNBERG
Pierce and Berman, JJ., concur

Davidovich and Welton
Charles Welton
Denver, Colorado
Attorneys for Plaintiff-Appellant

Joseph Dolan, United States Attorney
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Denver, Colorado
Attorneys for Defendants-Appellees

Plaintiff Carter alleged that the defendant Small Business Administration breached its contract with him by failing to comply with its statutory and regulatory duties to provide certain services and take certain action. The trial court initially dismissed the action under the belief that it did not have jurisdiction to review the issue. On appeal, we reversed and remanded the cause for further proceedings to determine whether there was any abuse of discretion in the officials' performance of their duties. *See Carter v. Small Business Administration*, 40 Colo. App. 271, 573 P. 2d 564 (1977) (Carter I).

In that opinion, we concluded the district court had jurisdiction to review this action by virtue of 15 U.S.C. 634(b) which provides in part:

> "In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter, the administrator may: (1) sue and be sued in any court of record of a state having general jurisdiction . . . ."

Following our remand, the trial court entered judgement for the Small Business Administration in plaintiff's action for breach of contract. Carter appeals, arguing that the trial court erred when it applied the standard of review for discretionary agency action to his claim for breach of contract. We disagree and therefore affirm the judgement.

The above statutory provision has been construed to confer jurisdiction to decide a claim for money damages for breach of contract, and there is no indication that a standard other than that for any other civil action should apply. *Mar v. Kleppe*, 520 F. 2d 807 (10th Cir. 1975); *Romeo v. United States*, 462 F. 2d 1036 (5th Cir. 1972), *cert. denied*, 410 U.S. 928, 93 S. Ct. 1361, 35 L. Ed. 2d 589 (1973); *Claxton v. Small Business Administration*, 525 F. Supp. 777 (S.D. Ga. 1981).

On the basis of these cases, plaintiff asserts error in the court's dismissal and argues that our first disposition should not have been applied as the law of the case. We disagree.

The holding in *Carter I* was two-fold. We first determined that 15 U.S.C. 634(b) constituted a waiver of sovereign immunity in monetary actions. We then held that when a complaint is based on an official's failure to observe its statutory duties, the action is governed by the Administrative Procedures Act, 5 U.S.C. §701, et. seq., and the question is limited to whether the officials' conduct was consistent with the objectives expressed in this legislation. The standard to be applied is whether there was a rational basis for the agency action taken.

It is implicit in our holding in *Carter I* that plaintiff's claim that a contract existed is, on its face, based only upon the expectation of benefits which defendant had no duty to provide. As such, the complaint was actually one of abuse of discretion in the performance of duties authorized under 15 U.S.C. §637, and the scope of review is limited to a determination of whether there was an abuse of discretion. Hence, our first decision controls, and the trial court did not err when it applied a limited scope of review.

We have reviewed plaintiff's other contentions and find them to be without merit.

Judgement affirmed.

JUDGE PIERCE and JUDGE BERMAN concur.